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No. 97-31

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin;
DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent.

PATRICK BRUCE GORDON,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Real Party in Interest Patrick Gordon, a state capital prisoner, hereby moves this Court for leave to proceed *in forma pauperis* in filing his opposition to the pending petition for writ of certiorari as well as in any further proceedings in the petition. 28 U.S.C. §1915. Real Party was granted leave to proceed *in forma pauperis* in his application for a writ of habeas corpus (28 U.S.C. §2254) -- the proceeding which led to the filing of the present petition -- by the United States District Court for the

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Eastern District of California. The district court appointed Real Party's present counsel to represent him in post conviction proceedings pursuant to 21 U.S.C. §848(q)(4)(B).

Respectfully submitted,

Dated: August 1, 1997

By: _____

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REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' POSITED "QUESTION PRESENTED" IS NOT FACTUALLY OR LEGALLY PRESENTED IN THIS CASE

As discussed below, the "Question Presented" Petitioners frame -- "Does [sic] 21 U.S.C. Section 848 and *McFarland v. Scott* create a separate 'post conviction proceeding' that survives the dismissal of a petition for writ of habeas corpus containing unexhausted claims?", Pet. at 1 -- is not presented in this case.

Procedurally, the Court is asked to review an exercise of discretion by the court of appeals in denying a writ of mandamus sought to review an exercise of equitable discretion by a district court. Because the issue could have been raised in an interlocutory appeal, supervisory mandamus was not proper in the first instance. Because the issue presented was not clear and indisputable, but involved the district court's exercise of discretion to conform its procedures to *McFarland*, Petitioners have not demonstrated that this Court should grant review to review the exercise of discretion by two lower courts.

Factually, Real Party in Interest Patrick Gordon, an indigent state capital prisoner, initiated this federal action by filing a skeletal petition for writ of habeas corpus and request for appointment of counsel. This original petition was not dismissed. Rather, the district court struck an amended petition it had ordered Gordon to file. The district court struck the amended petition after concluding its order requiring an amendment upon pain of dismissal was inequitable unless Gordon was first allowed to apply for funds to investigate his federal constitutional claims under 21 U.S.C. §848(q).

Legally, the district court's exercise of discretion to vacate its improvident order did nothing more than conform its procedures to *McFarland*, decided after the order requiring Gordon to amend was entered. The court of appeals, rather than "creating [a] free-floating separate post conviction proceeding untethered to any cognizable claim for relief," Pet. at 15, refused to exercise its own discretion on mandamus to disturb the district court's exercise of equitable discretion in "turning back the clock" to avoid prejudice to the prisoner. The court of appeals also found Petitioners lack standing to challenge an application for investigative funds -- a ruling they do not contest (or even mention) in this petition.

STATEMENT OF THE CASE[1]

The facts Petitioners submit are incomplete. Their Statement omits facts and oversimplifies the court of appeals' opinion in a manner material to the suitability of this case for review on certiorari. These details are necessary to obtain an accurate picture of what occurred below.

In particular, Petitioners fail to note that Gordon initiated this federal habeas proceeding by filing a "skeletal petition for habeas corpus" and request for appointment of counsel. App. A at 3. Petitioners also fail to mention that, shortly after his present attorneys were appointed, Gordon filed an initial request for investigative funds that was denied. App. D at 6. The magistrate judge[2] then ordered

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[1]Gordon does not contest jurisdiction or that the cited statutes are implicated.

[2]Petitions for writs of habeas corpus are referred to magistrate judges in the Eastern District of California. E.D.R. 302(c)(17).

Gordon to file an amended petition identifying all potential claims without the benefit of investigative funds or face dismissal of his petition. *Id.* at 6-7. When Gordon filed the coerced amended petition (which contained unexhausted claims), the magistrate judge stayed the federal proceedings to allow him to present his unexhausted claims to a state court. *Id.* at 1-2.

Gordon's application to the California Supreme Court for appointment of counsel was granted; the request for investigative funds he filed in that court was denied. App. A at 4.

Gordon then filed another request for investigative funds in the district court. App. A at 4. The district court found it could stay proceedings on a petition containing unexhausted claims (rather than dismiss the petition), and that Section 848(q) did not bar an award of investigative funds for unexhausted claims. App. C at 30. (These rulings are not challenged here.)

Thereafter, the magistrate judge recognized his original error in forcing Gordon to file an amended petition without benefit of investigative funds in light of *McFarland*, and recommended that the district court (1) vacate the order requiring Gordon to file an amended petition, (2) strike the amended petition only, (3) order Gordon to submit a new request for funds, and (4) after "[a] reasonable opportunity to investigate facts supporting federal claims, petitioner be allowed reasonable time *to amend his petition*." App. D at 12 (emphasis added). The district court adopted his recommendation. App. E.

Petitioners filed a petition for writ of mandamus challenging both orders. Pet. at 4. They focused on the district court's conclusion that Section 848 allowed the district court to award investigative funds for unexhausted claims. App. A at 5-7. Although Petitioners correctly note that their petition for a writ of mandamus was denied, their flat account of the court of appeal's "holding" (Pet. at 5) is not accurate.

Although Petitioners expressly disclaimed any challenge to the district court's original stay in their petition for mandamus, the court of appeals reached out to address the issue anyway. App. A at 8 & n.7. It vacated the portion of the district court's original order holding it should ordinarily stay, rather than dismiss, a mixed petition (a ruling Petitioners fail to note). *Id.* at 8-10. The court of appeals then recognized that the district court had effectively cured its error by striking the improvidently-ordered amended petition and returning the habeas proceeding to its original posture. *Id.* at 6 ("In effect, the district court returned the case back to its original posture before Gordon had alleged his unexhausted claims"). On the question of investigative funds, the court of appeals concluded Petitioners had no standing to contest an *ex parte* request for funds under Section 848(q) (another conclusion Petitioners fail to note and do not challenge). *Id.* at 11-12.

The court of appeals did *not* hold, as implied by Petitioners, that a district court could dismiss the entire federal habeas proceeding, Pet. at 7-12, yet retain jurisdiction to address a request for investigative funds under Section 848(q)(9). Compare Petition

at 5 with App. A at 11.[3] Its "holding" was that the district court efforts to conform its procedures to *McFarland* presented an isolated incident which did not merit the extraordinary remedy of mandamus. App. A at 11.

SUMMARY OF ARGUMENT

21 U.S.C. Section 848(q) provides for appointment of counsel to represent state capital prisoners in any "post conviction proceeding under [28 U.S.C. §]2254 ...." 21 U.S.C. §848(q)(4)(B). Section 848(q)(9) provides for "reasonably necessary" "investigative, expert or other services" in these proceedings.

In *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568 (1994), this Court held that a state capital prisoner could initiate a "post conviction proceeding" under Section 848(q) by filing a bare request for counsel or stay; the prisoner was not required to file a petition for writ of habeas corpus to begin a "post conviction proceeding." *Id.* at ___, 114 S.Ct. at 2572 - 73. The "proceeding" initiated by a request for counsel was also a sufficient predicate for the district courts to entertain applications by later-appointed counsel for funds to investigate the petitioner's federal constitutional claims. *Id.* at __, 114 S.Ct. at 2572.

The Court noted the then-prevailing practice in Texas was for indigent capital prisoners to file a "*pro forma* petition" for habeas corpus, request a stay of execution,

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[3]The prefatory "Overview" states "the district court could properly consider a request for funds under 21 U.S.C. §848(q)(9) even though no habeas petition was pending ...." App. A at 2. This statement does no more than echo *McFarland*. 512 U.S. at ___, 114 S.Ct. at 2572-73. In its later detailed statement of facts, the court of appeals recognized that Gordon's original petition remained on file. *Id.* at 3 & 6. Nothing indicates the court of appeals believed the district court had dismissed the entire federal habeas case and closed its file, yet then proceeded to entertain a request for investigative funds. See App. D & E.

and request appointment of counsel. *Id.* at ___, 114 S.Ct. at 2570 n.1. The Court recognized the risks inherent in these "skeletal petition[s] ... given the substantial possibility that the petition might be dismissed on the merits, and that any habeas petition later filed would be dismissed summarily as an abuse of the writ." *Id.* (discussing a letter filed in the lower court).

In the present case, filed before *McFarland*, the magistrate judge refused an initial request for funds, insisting instead that Gordon file an amended petition containing all possible claims *before* he would address the merits of the request. App. D at 2 & 6-7. The magistrate judge later recognized that his attempt to flush out unexhausted claims by insisting they be included in an amended petition was inappropriate, and further that forcing Gordon to amend his petition without the benefit of investigative funds was both unfair to Gordon and inconsistent with *McFarland.* His analysis (later adopted by the district court, App. E) cannot be improved upon:

> [After denying the initial request for funds], I required [Gordon] ... to amend his petition .... Under threat that failure to comply would result in my recommendation for summary dismissal of the petition, [Gordon] timely filed an amended petition setting forth numerous claims. This pleading only provided a motion by [Petitioners] to dismiss the petition because some of the claims had never been presented to the California courts.
>
> Recently, in McFarland v. Scott, [512 U.S. 849] (1994), the Supreme Court observed that "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims that their factual bases are researched and identified." *This observation provokes reconsideration of my prior disapproval of funds to investigate federal claims.*

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991) requires a federal habeas corpus petitioner to include all federal claims in a single federal petition unless in a second proceeding petitioner can excuse prior failure to include a claim by showing that petitioner did not possess or by reasonable means could not have obtained sufficient basis to allege a claim in the first petition through discovery, expansion of the record or an evidentiary hearing. 111 S.Ct. at 1472. .... Of course, this decision assumes that the federal habeas petitioner has the means to conduct an appropriate investigation. The same assumption is implicit in Fed.R.Civ.P. 81(a)(2), which applies the civil rules of procedure to habeas corpus proceedings -- Fed.R.Civ.P. 11 requir[es] habeas counsel to certify that all of the claims presented "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The McFarland decision removes any residual doubt about the matter. Federal habeas corpus counsel simply cannot avoid the pitfalls of McCleskey and comply with the obligations of Rule 11 unless given the opportunity to investigate potential habeas claims.

It is also fairly apparent that without the opportunity to conduct reasonable factual investigation, McCleskey virtually compels federal habeas counsel to file a petition containing any conceivable federal claim and that such a petition will invariably contain unexhausted claims. Upon filing such a petition, by virtue of Rose v. Lundy, 455 U.S. 509 (1982), "comity" then compels reference to the state court to allow it the first opportunity to consider the claims. ....

On the other hand, by allowing factual development in the federal proceeding, federal habeas counsel may find that there is inadequate factual support for a putative claim, omit it with reasonable professional confidence, and altogether avoid questions of "exhaustion." If there are facts to support a viable claim that ought to be presented in the first instance to the state court, "comity" is respected by presenting it in a manner in which it may be expeditiously addressed. *Thus, I conclude that the examination of a federal habeas corpus petition for unexhausted claims, required by Rose v. Lundy, supra, ought to be made only after federal habeas counsel has had [a] fair opportunity to conduct a reasonable factual investigation.*

App. D at 7-10 (emphasis added).

Habeas proceedings are governed by equitable principles. "The court shall ... dispose of the matter as law *and justice* require." 28 U.S.C. §2243 (emphasis added).

See, e.g., Withrow v. Williams, 507 U.S. 685, ___, 113 S.Ct. 1745, 1757 (1993) (O'Connor, J., concurring in part and dissenting in part); *Reed v. Ross*, 468 U.S. 1, 9 (1984). The district court recognized that, in light of *McFarland*, its order requiring an amended petition without benefit of investigation was improvident, and it utilized its equitable powers to correct that error to avoid prejudice to Gordon. In particular, the district court concluded that, given this court's decision in *McCleskey*, counsel for Gordon would necessarily be forced to assert any conceivable claim if required to file an amended petition without the benefit of investigation to avoid a defense of abuse of the writ if those claims were raised for the first time in a later proceeding. App. D at 8-9. *See McFarland*, 512 U.S. at ___, 114 S.Ct. at 2570 n.1 (quoted above). *Cf. Reed*, 468 U.S. at 15-16 (appellate counsel in state criminal proceedings was not required to raise "any and all remotely plausible claims" to avoid a procedural default defense in later federal habeas proceedings).

The court of appeals, while expressly disapproving the district court's earlier conclusion that it was not required to dismiss a petition containing unexhausted claims, nonetheless found no grounds for disturbing the district court's exercise of its equitable powers to "turn back the clock" once it recognized its error in light of *McFarland*. App. A at 11. Both the district court and the court of appeals recognized that, after the district court's remedial order which noted Gordon's still-pending original petition, there was no unmoored "separate 'post conviction proceeding,'" but a post conviction proceeding based upon the original petition. App. A at 6 ("In effect, the district court

returned the case back to its procedural posture before Gordon had alleged his unexhausted claims."); App. D at 12.

To summarize, the district court's exercise of equitable discretion to adjust the procedural posture of a habeas proceeding in light of a new decision from this Court did not present extraordinary circumstances meriting the exercise of supervisory mandamus.

Assuming for the moment that the district court had actually dismissed both the amended and original petitions as argued by Petitioners, Petitioners do not have standing to object that a federal court is entertaining an application for federal investigative funds. *See Massachusetts v. Mellon*, 262 U.S. 447, 48-82 (1923). *See also Allen v. Wright*, 468 U.S. 737, 754 (1984). As noted, Petitioners do not mention, much less challenge in this petition, the court of appeals' conclusion that they lacked standing to complain of a request for investigative funds.

REASONS TO DENY THE PETITION

The district court exercised equitable powers to correct an error which became apparent after this Court's decision in *McFarland*. The court of appeals, while disapproving earlier actions by the district court (which are not at issue in this petition), found no reason to disturb the district court's attempt to conform its actions to a then-recent decision of this Court. The court of appeals found Petitioners had no standing to challenge a request for investigative funds, a conclusion they do not contest. The court of appeals exercised its own discretion in denying mandamus.

Mandamus is a discretionary remedy which may be invoked only if the moving party's right to relief is "clear and indisputable." *United States v. Duell*, 172 U.S. 576, 582 (1899). "[I]ssuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). "Courts faced with petitions for peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n.6 (1967). This Court has strongly suggested that mandamus should not be employed when the question presented involves an exercise of discretion by the district court that could be raised by an interlocutory appeal. *See Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 n.7 (1978) (plurality opinion).

When the district court initially decided to stay proceedings, rather than dismiss the amended petition containing unexhausted claims, Petitioners could have requested certification for immediate appeal, 28 U.S.C. §1292(b), but did not do so. Two courts of appeal have found such stays immediately appealable under the collateral order doctrine. *See Christy v. Horn*, 115 F.3d 201, 203-206 (3d Cir. 1997); *Johnson v. Texas*, 878 F.2d 904, 905-906 (5th Cir. 1989). Mandamus was not the appropriate vehicle for Petitioner's challenge to the district court's rulings and the court of appeals' denial of relief is proper on that ground alone. Moreover, the suitability of this case for review on certiorari presents three layers of discretion: (1) the district court's exercise of equitable discretion to modify the procedural posture of the habeas

case to conform with *McFarland*, see App. D at 7-11; (2) the court of appeals' exercise of discretion to deny the writ (after correcting a perceived error not presented by this petition), see App. A at 11; and (3) this Court's discretion to limit its docket to questions that are "special and important." See S.Ct.R. 17.1. These layers of discretion explain why this Court has historically reviewed only a handful of court of appeals decisions denying petitions for writs of mandamus.[4] Nothing suggests this district court's isolated attempt to conform its procedures to a recent ruling of this Court presents a "special and important" issue given this background.

Finally, Petitioners do not establish this denial of mandamus "conflicts with every other decision that has considered the scope of the 'post conviction proceeding' created by section 848 and *McFarland*." Pet. at 13. Not one case they cite addresses the present scenario where a district court forced a habeas petitioner to amend his petition without meaningfully addressing his request for investigative funds, then thought better of its actions in light of *McFarland*.

Petitioners cite the following cases as inconsistent with the court of appeals' decision: *Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997); *Turner v. Johnson*, 106 F.3d 1178, 1182-83 n.8 (5th Cir. 1997); *In re Joiner*, 58 F.3d 143 (5th Cir. 1995); *Sterling v. Scott*, 57 F.3d 451, 457 (5th Cir. 1995); *In re Parker*, 49 F.3d 204, 209 (6th Cir.

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[4]The Court appears to have granted certiorari to review the denial of a petition for writ of mandamus by a federal court of appeals only nine times in the past 100 years. *See, e.g., Carnegie Mellon University v. Cahill*, 484 U.S. 343 (1988); *Societe Nationale v. United States District Court*, 426 U.S. 394 (1976); *Kerr*, 426 U.S. 394; *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Fletcher v. Bryan*, 361 U.S. 126 (1959); *Bankers Life v. Holland*, 316 U.S. 379 (1953); *Delaware Railroad Co. v. Rellstab*, 276 U.S. 1 (1928); *McClellan v. Carland*, 217 U.S. 268 (1910); *Duell*, 172 U.S. 576.

1995); *Steffen v. Tate*, 39 F.3d 622, 624 (6th Cir. 1994); *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993); *Shaw v. Delo*, 971 F.2d 181, 187-88 (8th Cir. 1992); *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989); *Wainwright v. Norris*, 836 F.Supp. 619, 621 (E.D.Ark. 1993); *Coleman v. Vasquez*, 771 F.Supp 300, 304 n.5 (N.D.Cal. 1991); *McKinney v. Paskett, 753 F.Supp. 861 (D.Id. 1990); United States ex rel. Whitehead v. Page*, 914 F.Supp. 1541 (N.D.Ill. 1995); Pet. at 13. Each case either involves a different legal issue or arose in a different procedural posture. For example, in ten of the thirteen cited cases, the prisoner asked the federal court to take some action to facilitate state court litigation,[5] or to act despite pending state proceedings.[6] In addition, a mixed or totally unexhausted petition had been filed and denied or dismissed in three of the cited cases,[7] and no petition had ever been filed in three others.[8] Three of the cases -- *Steffen*, *Parker*, and *Turner* -- do not address the "scope of the post-conviction proceeding" under Section 848 at all. Rather, they refuse to

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[5]In *Joiner*, *Sterling*, *Hill*, *Shaw*, *Lindsey*, *Wainwright*, and *McKinney*, capital petitioners sought appointment of counsel for representation in state proceedings or federal funding for experts to testify in state proceedings. *Joiner*, 58 F.3d at 144; *Sterling*, 57 F.3d at 454; *Hill*, 992 F.2d at 802 - 803; *Shaw*, 971 F.2d at 188; *Lindsey*, 875 F.2d at 1505; *Wainwright*, 836 F.Supp. at 619 - 620; *McKinney*, 753 F.Supp. at 865. In *Steffen*, 39 F.3d at 623, petitioner sought a stay of execution to further exhaust state remedies; similarly, in *Sterling* and *Christy* the petitioners sought to hold mixed petitions in abeyance pending exhaustion. *Sterling*, 57 F.3d at 452; *Christy*, 115 F.3d at 203. (Again, Petitioners do not challenge the district court's original stay on grounds later disapproved by the court of appeals). Moreover, *Lindsey* and *Shaw* involved successor federal petitions. *Lindsey*, 875 F.2d at 1503; *Shaw*, 971 F.2d at 183.

[6]*Whitehead*, 914 F.Supp. at 1543 (request for federal counsel was premature when claims were "actively under review" in state court).

[7]*Sterling*, 57 F.3d at 453; *Shaw*, 971 F.2d at 188; *Lindsey*, 875 F.2d at 1504.

[8]*Parker*, 49 F.3d at 206; *Steffen*, 39 F.3d at 623; *Whitehead*, 914 F.Supp. at 1541.

extend *McFarland* to cases in which the attorney who represented the petitioner in state proceedings sought the stay *McFarland* authorized for counsel new to the case (Gordon's present attorneys did not represent him in earlier state court matters),[9] or to federal counsel who had already filed a comprehensive federal petition.

Although decided before *McFarland*, the final case cited by Petitioners, *Coleman v. Vasquez*, is consistent with both *McFarland* and the district court's exercise of equitable discretion to allow investigation before requiring an amended petition (an exercise of discretion the court of appeals refused to disturb on mandamus).

> The investigation of possible claims under Section 848(q) ... does no violence to the exhaustion doctrine, which is limited to the *adjudication* of constitutional claims. That attorneys ... may research and investigate unexhausted claims -- in precisely the same manner that privately retained attorneys may research and investigate such claims -- does not intrude on state sovereignty. The federal court in no way has trod on the state court's resolution of the federal constitutional issues. Following the investigation, the prisoner either will decide that a claim exists and pursue it in state court, in accordance with the exhaustion requirement, or will decide the claim is not tenable and abandon it.

Coleman, 771 F.Supp. at 303 (emphasis added).

After all, both the state and federal court are charged with the responsibility to determine if the conviction and death sentence of the prisoner violated the federal constitution. *See Ex parte Royall*, 117 U.S. 241, 251 (1886). Particularly on the specific facts of this case, where the state court has denied investigative funds, the state

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[9]Petitioners' musings about Gordon's former counsel in state proceedings, Pet. at 10, are not supported by the record. Petitioners intimate Gordon personally robbed and murdered the victim, Pet. at 3-4, when, in fact, he allegedly "drove the getaway car during commission of the robbery and murder." App. A at 3 n.2. Of course, neither point has anything to do with the issue presented in this petition.

had no interest in a federal court's decision to entertain a request for federal funds in a federal proceeding. (Petitioners have not challenged the court of appeals' determination that they have no standing to object to an award of investigative funds). If the prisoner is awarded investigative funds and discovers meritorious unexhausted claims, should the prisoner return to state court to exhaust those claims the state courts will receive the benefit of a more fully developed factual record upon which to address them.

Where, as here, the district court recognized its error in demanding the prisoner file an amended petition before allowing investigation of possible claims and moved to correct that error, the district court did not abuse its discretion in doing so, the court of appeals did not abuse its discretion in refusing to interfere through issuance of an extraordinary writ, and these multiple layers of discretionary decisions present no issue worthy of consideration on certiorari.

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CONCLUSION

Petitioners employed the wrong procedural vehicle below, they seek review of multiple discretionary decisions, and they lack standing to complain. The petition should be denied.

Respectfully submitted,

Dated: August 1, 1997

By: _____

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PROOF OF SERVICE

I am a citizen of the United States employed in the City and County of Sacramento. My business address is 770 L Street, Suite 1440, Sacramento, California, 95814. I am over the age of eighteen years and not a party to the above-entitled action.

I am familiar with the firm's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On **August 1, 1997,** I served the following:

SUPREME COURT OF THE UNITED STATES APPEARANCE FORM/WAIVER;

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

X on the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail

____ on the parties in this action by causing a true copy thereof to be delivered by hand to the offices of the addressee(s)

____ by United Parcel Service

addressed as follows:

Ward A. Campbell
Deputy Attorney General
Department of Justice
1300 I Street, Suite 1101
Sacramento, CA 95814

Gail R. Weinheimer, Esquire
862 Sir Francis Drake Blvd., Suite 245
San Anselmo, CA 94960-1914

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed on August 1, 1997, at Sacramento, California.

Karen A. Armstrong
KAREN A. ARMSTRONG

Segal & Kirby
Attorneys
The Union Bank of California Center
770 L Street, Suite 1440
Sacramento, California 95814

Telephone (916) 441-0828
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August 1, 1997

Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *Arthur Calderon v. United States District Court, Eastern District*
Docket No. 97-31

Dear Clerk:

Please forward an endorsed-filed copy of our Motion for Leave to Proceed in Forma Pauperis and Opposition to Petition for Writ of Certiorari in the attached self-addressed, stamped envelope provided for your convenience.

Thank you in advance for your assistance in this matter.

Very truly yours,

Karen A. Armstrong

Karen A. Armstrong, Secretary to
JAMES R. KIRBY II

/kaa
Enclosures

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APPEARANCE FORM / WAIVER

SUPREME COURT OF THE UNITED STATES

No. 97-31

Arthur Calderon, et al. (Petitioner) v. U.S. District Court, Eastern District (Respondent)

Patrick Bruce Gordon, Real Party in Interest

I do not intend to file a response to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☒ Please enter my appearance as Counsel of Record for ~~all respondents~~ Real Party in Interest, Patrick Bruce Gordon

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed from when you were admitted):

Signature

Date: August 1, 1997

(Type or print) Name James R. Kirby II

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Segal & Kirby

Address 770 L Street, Suite 1440

City & State Sacramento, California Zip 95814

Phone (916) 441-0828

A copy of this form must be sent to petitioner's counsel or to petitioner if *pro se*. Please indicate below the name(s) of the recipient(s) of a copy of this form:

CC: Ward A. Campbell, Deputy Attorney General
Counsel of Record for Petitioner
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

CLER-0080-9-95